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In The
Supreme Court of the United States

OCTOBER TERM, 2001

No.: 01-721

NORMAN M. ROBERTSON, et als.

Appellants,

v.

LARRY BARTELS, et als.

Appellees.

On Appeal from the United States District Court for the District of New Jersey

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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The New Jersey Apportionment Commission classified incumbent legislators and certain other candidates by race. These classifications were used to formulate a redistricting plan that, regardless of party affiliation, discriminated in favor of some incumbents and candidates and against others according to their race. Incumbents and voters alike have been adversely affected by this discrimination.

No basis exists to dismiss this appeal or to summarily affirm the errant holding of the lower court. In fact, the record

before this Court is sufficiently undisputed as to allow the Court to enter a summary reversal of the ruling below.

I. THE RECORD SHOWS THAT INCUMBENTS WERE CLASSIFIED BY RACE AND SUBJECTED TO RACIAL DISCRIMINATION IN A REDISTRICTING PLAN WHICH WAS NOT NARROWLY TAILORED TO MEET A COMPELLING STATE INTEREST.

A. Direct Evidence of Racial Classifications.

Consciousness of the race of voting populations is sometimes necessary to the configuration of new legislative districts. However, consciousness of the race of specific incumbents and candidates is not.

New Jersey's incumbent legislators were classified by race without regard to their party affiliation. Those incumbents considered members of minority groups were placed in electorally "safe" districts. Non-minority incumbents were not afforded the same consideration.[1]

This policy had its greatest impact on the incumbents and voters in District 34. The Apportionment Commission, went to great lengths to assure the electoral success of racially preferred candidates. Two of the six towns in the district were sent to District 40 in order to provide a safe seat for incumbent Republican Assemblyman Kevin O'Toole because his mother is Korean.[2] Further room was made in district 34 so that two

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[1] The Supreme Court has permitted incumbent protection as a legitimate state goal in the redistricting process. *See, e.g., Bush v. Vera*, 517 U.S. 952, 964 (1996); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). The constitutional problem arises when such protection is given or withheld on the basis of the race of the incumbent.

[2] It should be noted that the District 40 incumbent Assemblyman displaced by this move was also Republican and was the longest serving member of the New Jersey General Assembly. Assemblyman Nicholas Felice was

towns with large African-American populations could help transform the district into a Democratic stronghold in order to facilitate the election of two African-American legislators. At one point, the pivotal Eleventh Member even had his attorney telephone three African-American incumbents in order to obtain their assurance that they could win their contests.[3]

Direct evidence of the Commission's commitment to this policy is already a part of the record before this Court.

> I considered the incumbency of current members of the legislature to be relevant with respect to *minority representation*, partisan balance, and minimizing voter disruption. *The plan adopted by the commission, NJ2001 . . . does not seem to me to pose any significant threats to minority representation . . . .*

Certification of Professor Larry Bartels, J.S. App. at 63a (emphasis added).

The Apportionment Commission was properly anxious to insure that minority voters were not disadvantaged in a way that violated the Voting Rights Act. The constitutional problem arose when they went beyond the Act's requirements to examine and act upon the race of individual incumbents and candidates. The record of intent is clear and undisputed.

> African-Americans, Hispanics, and other racial and ethnic minority groups protected by the Voting Rights Act and the federal Constitution are not currently represented in the New Jersey Legislature in proportion to their statewide population. I was therefore determined not to adopt any plan that

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placed in a strong Democratic district and he was unable to win re-election. Assemblyman Felice's mother is Italian.

[3] The three African-American incumbents contacted were those who were expected to run against the incumbent 34th District legislators. The result was predictable. All three of the non-minority legislators, including appellants Senator Robertson and Assemblyman Zecker were defeated by large margins.

> would significantly threaten the reelection chances of incumbent minority legislators, and furthermore I was determined to examine possibilities for expanding minority representation.

Certification of Professor Larry Bartels, J.S. App. at 57a.

Professor Bartels may have been well intentioned, but there can be no doubt that the Commission classified incumbents and certain candidates by race. The result was a plan that discriminated against non-minority incumbents and candidates by denying them the same level of protection and consideration given to those of other races.[4]

B. The Absence of a "Compelling State Interest" Has Already Been Established.

Racial classifications will be upheld only when they are "narrowly tailored" to serve a "compelling state interest." *City of Richmond v. J. A. Crosson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267 (1986); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, (1978). This rule applies with no less force in the redistricting setting. *See, e.g., Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Reno*, 509 U.S. 630 (1993).

Avoiding liability under the Voting Rights Act is normally cited as the compelling state interest in redistricting cases. Before such a compelling interest can be invoked, however, there must be a "strong basis in evidence" for finding the threshold conditions for section 2 liability by application of the three-pronged test in *Thornberg v. Gingles*, 478 U.S. 30 (1986). *King v. State Bd. of Elections, 979 F.Supp.* 619 (N.D. Ill. 1997), *aff'd,*

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[4] "A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432, (1984); *McLaughlin v. Florida*, 379 U.S. 184, 196, (1964); *Loving v. Virginia*, 388 U.S. 1, 11, (1967). See also *Miller v. Johnson*, 515 U.S. 900, (1995) (The "central mandate" of the Equal Protection Clause "is racial neutrality in governmental decision making.")

522 U.S. 1087 (1998). See also, *Bush v. Vera*, 517 U.S. 952, 994 (1996) (O'Connor, J. concurring).

The Court in *Gingles* held that a potential section 2 violation exists if the minority group in a given area is geographically compact, politically cohesive and potentially barred by majority bloc voting from electing its preferred candidate. *Thornberg v. Gingles*, 478 U.S. 30, 50-51 (1986).

The Apportionment Commission consistently argued that their approach did not violate the Voting Rights Act because of the absence of majority bloc voting. After a full trial on the merits in the *Page* case, the three-judge court agreed finding that "there was no credible evidence presented that 'a white bloc vote normally will defeat the combined strength of minority support plus white crossover votes." *Page v. Bartels*, 144 F. Supp. 2d 346, 366 (D.N.J. 2001).

There never was a compelling state interest in the New Jersey redistricting sufficient to justify the racial classification of individual incumbents and select candidates. Professor Bartels's concerns about the proportion of minority legislators to statewide minority populations do not serve to permit racial discrimination against non-minority incumbents and other candidates.[5]

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[5] "[T]he mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight . . . Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." *City of Richmond v. J. A. Crosson Co.*, supra, 488 U.S. at 500, 109 S. Ct. at 725. This is especially true with respect to Professor Bartels's expressed concerns. In fact, section 2 of the Voting Rights Act expressly states: "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. sec. 1973 (b).

C. The Redistricting Plan is not Narrowly Tailored.

Even if there were a compelling state interest, the New Jersey plan is not narrowly tailored. Classification of incumbents by race was not necessary. The Republican map and the variations suggested by Professor Bartels's own staff all complied with the Voting Rights Act – and they did not suffer from the same constitutional infirmity as the adopted plan.

Professor Bartels's reliance on "other factors" had the effect of exalting the professor's analytical matrix over the central mandate the Fourteenth Amendment. It is surely possible for the Apportionment Commission to develop a plan that will not racially discriminate against certain incumbents and candidates. It should be required to do so.

II. APPELLEES AND THE COURT BELOW MISAPPLY THE "PREDOMINANT FACTOR" TEST.

Appellees and the court below argue that *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny require a showing that race was the predominant factor in the drawing of district lines before a redistricting plan can be held to strict scrutiny. This application of the predominant factor test is misplaced because all of the cited cases are distinguishable on their facts.

The *Shaw* line of cases[6] involved challenges by white voters to newly drawn minority-majority districts. These cases frequently involved districts with bizarre shapes and scant direct evidence of legislative intent. The Court in these cases fashioned a test to determine whether the use of race was so predominant as to be tantamount to a racial classification.

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[6] See, e.g. *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941, 135 L. ed. 2d 248 (1996), *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996); *Miller v. Johnson* 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995); *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993).

There is no mystery in the present case. The undisputed record shows that incumbents and certain legislative candidates were classified by race. Protection and consideration were extended to some incumbents and candidates and not others on the basis of race and without regard to partisan affiliation.

Senator Robertson, Assemblyman Zecker, and other incumbents suffered a harm that was personal in a way not shared by the plaintiffs in the *Shaw* cases. The non-incumbent appellants were affected by the spillover of this policy as they faced a District 34 configuration in which race was the predominant factor. Three sister communities in Passaic County saw their collective influence diminish as the traditional redistricting principle of community of interest gave way to the desire to achieve a racial result.

The Shaw line of cases are very useful, however, in that they subscribe to the principle that: "'A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.'" *Shaw v. Reno*, 509 U,.S. at 643-44, quoting *Brown v. Bd. of Education*, 347 U.S. 483 (1954).

The appellees in the present case claim that a clear racial classification must be subject to an additional predominant factor test before strict scrutiny will be triggered.. Such a claim is a plain misreading of the law that would reverse the presumption of invalidity set forth in *Brown*, *Shaw* and decades of Equal Protection precedent.

III. THE APPEAL HEREIN WAS TIMELY FILED

The time limit for filing this appeal is 60 days. Title 28, Section 2101 (b) of the United States Code provides as follows regarding the time for appeals to this Court:

> Any other direct appeal to the Supreme Court *which is authorized by law,* from a decision of a district court in any civil action, suit or proceeding shall be taken

> within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final. (emphasis added).

The law authorizing this appeal to the Supreme Court is set forth in section 1253 of Title 28 of the United States Code:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding *required by any Act of Congress to be heard and determined by a district court of three judges*. (emphasis added.)

Section 2284 (a) of Title 28 of the United States Code sets forth the three judge requirement:

> A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

Only the constitutional challenges to the statewide apportionment were required to be heard by the three-judge district court. The three judge court reached a final judgment on both such issues. A third issue deemed unrelated to the constitutional challenge to the apportionment was severed from the three-judge case and referred to a one-judge court.

The grant of summary judgment in the present case was full and final and the sixty day time limit applies. The notice of appeal within was filed on July 26, 2001. The three-judge district court's order was originally entered on June 14 and corrected on June 26, 2001.

IV. *RES JUDICATA* PRECLUSION IS WHOLLY INAPPROPRIATE.

In addition to the strong policy arguments set forth in the Jurisdictional Statement, preclusion of the appellants' claims because of a decision in *Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001), is inappropriate because: (1) the present matter does not share the same parties, claims or causes of action, and (2) the unique nature and timing of the *Page* case precluded intervention in the usual manner under the rules of court.

1. The *Page* case involved minority voter dilution claims, primarily under the Voting Rights Act. The present case involves harm done to non-minority incumbents and voters by the racial classification of incumbent legislators and certain candidates. The proofs in the two cases are entirely different.

Neither Senator Robertson nor Assemblyman Zecker were consulted prior to the filing of the complaint in *Page*, nor did they authorize the attorneys to file a complaint on their behalf. Neither legislator had any control over the *Page* litigation and could not issue instructions to the attorneys. They certainly gave no authority to the *Page* attorneys to waive any claims on their behalf. Moreover, the filing of the complaint in the present case was not coordinated with the efforts in *Page*.

The listing by *Page* counsel of "Assembly Republican Majority" and "Senate Republican Majority" as plaintiffs is not binding on the incumbent appellants herein. The appellants here are not in privity with any of the plaintiffs in *Page*.

2. Senator Robertson and counsel for the remaining appellants had an obligation to file their complaint in good faith and after diligent inquiry into the prospective claims. Still, the complaint here was brought just 16 days after the adoption of the new map. Unfortunately, this was only one business day before a full trial on the merits in *Page*, a case which had been filed within hours of the plan's adoption.

Rule 24 (b) of the Federal Rules of Civil Procedure provides for permissive intervention "upon timely application" when there are common issues of law or fact. Rule 24 (c) requires that this application be made by motion. Even if a court were to find common questions of law or fact, a motion made one day before trial would not have been timely. Similarly, the expedited timeline in *Page* worked against a court consolidating the trial of the two actions under Rule 42.

The appellants here acted diligently and without intent to "maneuver." The racial classification of incumbents caused injury to the incumbent appellants that was quite personal in nature and which could not be dealt with in a minority voter dilution case. *Res judicata* preclusion would create a grave injustice to the appellants and to the sane constitutional review of redistricting.

CONCLUSION

There are no grounds to dismiss this appeal or to summarily affirm the errant lower court decision. Rather, the record is sufficiently undisputed as to allow for the summary reversal of the lower court ruling. This matter should be remanded to the district court with instructions to order the Apportionment Commission to adopt a new plan that does not discriminate among racial classifications of incumbents and that protects the incumbent appellants from retaliation for bringing this action.

Respectfully submitted,

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